In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-614

DONALD R. NANCE, II, AND THOMAS N. TILESTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners assert that the judgment of the court of appeals is inconsistent with its opinion and that their "position instruction" should have been given.

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioners were convicted on seven counts of a fifteen-count indictment for mail fraud, in violation of 18 U.S.C. 1341. Each petitioner was sentenced to a term of five years' imprisonment on each count; these terms were partly concurrent and partly consecutive, making an aggregate term of seven years' imprisonment for each petitioner, with immediate parole eligibility under 18 U.S.C. 4208(a)(2). The court of appeals reversed as to four counts and affirmed as to the remaining three counts (Pet. App. A).[1]

[1]The reversal did not affect the aggregate imprisonment for each petitioner.

Petitioners, operating as Nance and Associates, Ltd., arranged with several companies to sell products on racks to be installed at different retail places of business. Petitioners then, by advertisement, solicited prospective deaers offering to sell distributorship franchises for the operation of the racks. Those who responded were mailed brochures by petitioners; these brochures represented that high quality sales locations would be obtained, that there would be continuous operations assistance, and that a brief training course would be given. Prospective dealers were required to deposit $800 as earnest money to secure the dealership, receipt of which eventually was confirmed by mail. Dealers were to reorder their inventory and pay for such orders in advance. Representations were made as to the profits to be gained by dealers. However, Nance and Associates, after accepting the earnest money and advance payments for orders, did not furnish the stock, locations, and assistance that had been promised (Pet. App. A, pp. A-1 to A-3).

1. The court of appeals held (Pet. App. A, p. A-5):

> Viewing all of the evidence in the light most favorable to the government, including the permissible inferences flowing therefrom, we conclude that the government did prove a scheme to defraud on the the part of Tileston and Nance but that such scheme was not proven to have originated at least until nearly November of 1971. * * *

Petitioners correctly point out that the opinion as originally handed down was inconsistent with the judgment, because the mailings involved in the three affirmed counts took place prior to November 1971. However, on December 6, 1974, the court of appeals correct-

ed "November of 1971" to read "November of 1970" (App., *infra*). In light of this corrected date, which accurately reflects the evidence before the court, the inconsistency of which petitioners complain no longer exists.

2. Petitioners also contend that the district court erred by declining to read to the jury their proposed instruction explaining their position. However, the district court gave an instruction adequately covering the substance of petitioners' proposed charge (IV Tr. 1018-1019, 1040-1045).[2] In these circumstances it was not error to decline to use petitioners' wording, which the court of appeals correctly characterized as "verbose" (Pet. App. A, p. A-17).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

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[2]The government is lodging with the Court Volume IV of the trial transcript.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

74-1047 (Supreme Court No. 74-614)

September Term, 1974

UNITED STATES OF AMERICA,

APPELLEE,

vs.

DONALD R. NANCE, II
and
THOMAS N. TILESTON,

APPELLANTS.

Appeal from the United States District Court for the Eastern District of Missouri.

On the court's own motion it is now here ordered that our slip opinion filed in this cause on August 20, 1974, be, and it is hereby, amended nunc pro tunc to provide that the third line from the bottom of page 5 of the slip opinion be changed from its present language of ". . . at least until early November of 1971." so that the third line from the bottom of page 5 of our slip opinion now reads ". . . at least until early November of 1970."

December 6, 1974

A True Copy.

Attest: Robert C. Tucker

Clerk, U.S. Court of Appeals, 8th Circuit.